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In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

MATTHEW C. FULLER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF OF AMICI CURIAE STATES OF KANSAS, IDAHO, OKLAHOMA, SOUTH DAKOTA AND VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The states administer criminal justice systems that are being called upon to deal with an unprecedented number of offenders for whom sex offender treatment programs are determined by sentencing courts to be important conditions of probationary release or other lenient sentencing alternatives. Sex offender treatment programs can be effective in reducing recidivism for these offenders, but only if the offenders comply with the conditions of participation in the program. The holding of the Montana Supreme Court in this case threatens the effectiveness of court-ordered sex offender treatment by eliminating the ability of prosecutors to respond to disclosures made during treatment which indicate the offender poses a greater threat to society than believed at the time of sentencing. The holding is based on the Fifth Amendment to the Constitution of the United States, which applies to all states. The result of extension of this rule, as a federal constitutional principle, to the amici states would be the significant curtailment of court-ordered sex offender therapy as an alternative to lengthy periods of incarceration for sex offenders, creating additional incarceration costs for the states and eliminating a humane alternative to incarceration for these offenders. The holding fails to accord proper weight to the decisions of this Court construing the Fifth Amendment and the conditional liberty interests of probationers. For the reasons that follow, the amici states respectfully urge the Court to grant the writ and reverse the Montana Supreme Court's decision.

SUMMARY OF ARGUMENT

Sex offender treatment programs require a commitment from the offender that he[1] will honestly disclose certain information regarding his past conduct. In the Montana program at issue in this case, Respondent was expected to make these disclosures on two occasions, once in the initial intake process that determined his eligibility for the program, and again during the therapy itself. His willingness to make the disclosures was an implicit requirement of his eligibility for the treatment program and, therefore, of the probationary sentence he received. He made certain disclosures which were reported to law enforcement authorities as required by Montana law. Mont. Code Ann. § 41-3-201 (1993). The Montana Supreme Court, in effect, created a rule requiring the States to extend use immunity to an offender for such disclosures as a matter of federal constitutional law under the Fifth Amendment.

The right to avoid self-incrimination under the Fifth Amendment must generally be asserted or it is deemed waived. While this Court has identified a limited class of cases in which the privilege is deemed to be "self-executing", this case does not, contrary to the Montana Supreme Court's decision, fit within that category. Respondent was not placed in a "classic penalty situation" by a requirement that he waive his right to remain silent in exchange for lenient treatment at sentencing.

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[1] Studies show that sex offenders are overwhelmingly male, but share few other common traits. A. Salter, *Transforming Trauma* at 26-33 (1995).

State courts afford sentencing leniency to sex offenders who comply with treatment programs because of a belief that the treatment programs provide sufficient protection to the community to justify an alternative to the offender's incarceration. If the offender is unwilling to make the disclosures that are necessary to the treatment program's effectiveness, the offender does not belong in the program and must be dealt with through other penal alternatives that will provide sufficient protection to the community. While the choice to enter the program and make the required disclosures may be a difficult one for an offender with a history of uncharged offenses, the amici states submit that it is not a choice that renders the Fifth Amendment privilege self-executing. Simply put, the Constitution does not require the states to extend use immunity to a sex offender for disclosures made during the course of his participation in a sex offender treatment program that is offered to the offender as a condition of a probationary sentence.

ARGUMENT

I. Probationary Sentences Conditioned On The Defendant's Participation In Sex Offender Treatment Programs That Require Offenders To Disclose Prior Offenses Are Prevalent.

Respondent's case illustrates a procedure that is common in the amici states. An offender is before the court for sentencing on a sex offense. The offense of which he has been convicted allows the sentencing court a number of sentencing alternatives, ranging from a lengthy period of incarceration to suspension or deferral of sentence

upon the offender's agreement to comply with certain probationary conditions. *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation is simply one point (or, more accurately, a set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.")

For several reasons, probationary sentences are attractive for such offenders, at least those without a history of violent offenses. Often the state's penalogical goals will be advanced by requiring the offender to provide restitution to victims for medical and counselling costs incurred as a result of the offender's conduct. Restitution is not a realistic alternative when the offender is incarcerated. Probationary sentences allow the offender to remain in the community, where he may work and continue to support his family. Moreover, studies show that untreated sex offenders re-offend at a high rate. A. Salter, *Transforming Trauma* at 5-13 (1995) (collecting and summarizing studies). Treatment programs may be much more available in a community setting than an institutional one, and in the community setting they can more readily be provided at the offender's expense. The availability of treatment programs facilitates plea negotiation in this class of cases in which convictions after trial may be difficult to obtain, and may be obtainable only at the cost of further traumatization of child victims through required court testimony. Finally, courts perceive that incarceration presents management challenges for institutions where sex offenders are housed.[2]

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[2] It is the experience of the amici states that incarcerated sex offenders, especially those who have offended against

Balanced against these factors is the paramount requirement that the sentencing court protect the community from the danger that sex offenders will re-offend. Incarceration protects that interest in the near term, but since virtually all sex offenders will at some point become eligible for release into the community, incarceration without treatment cannot protect the community in the long term.

Courts in the amici states perceive sex offender treatment as a condition of probationary release as a means of serving both these interests. The probationary release allows the offender to remain in the community, to work, to continue to support his family, and to pay restitution to the victim. The treatment program provides a realistic measure of protection for the community by providing a mechanism to monitor the sex offender's conduct and to modify that conduct to eliminate or greatly reduce the chance that the offender will re-offend.[3] *See Griffin*, 483 U.S. at 875 (recognizing that probation conditions serve the dual purpose of promoting rehabilitation of the offender and protecting society.)

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children, are disproportionately the victims of violent acts by other inmates, and also offend against institutional regulations at a high rate.

[3] The amici states are aware that research on the efficacy of sex offender treatment programs in reducing recidivism for sex offenders is inconclusive. *See, e.g.*, P. Finn, *Do Sex Offender Treatment Programs Work?*, 78 Judicature No. 5 at 250 (Mar.-Apr. 1995). Nevertheless, it continues to be the judgment of sentencing courts in the amici states that such programs are appropriate as part of the regimen of probation conditions for sex offenders in many cases.

Most sex offender treatment programs, including the one in which Respondent enrolled, require the offender to make certain candid disclosures of prior offenses, including the offense for which the offender has been placed in the program. In many programs, the treatment providers will not accept for treatment persons who are "in denial", *i.e.*, who are unwilling to admit the full extent of their offending history. The offender's acceptance of responsibility for the consequences of his past conduct is, in these programs, an important aspect of the therapy's success. Thus, the offender's willingness to disclose information regarding prior offenses, whether those offenses have been charged or not, is an important factor in the offender's eligibility for the program. Accordingly, prosecutors in the amici states are reluctant to recommend probation for offenders who are unwilling to make these disclosures.

States also have a significant interest in the protection of the community in the short term and in the punishment of those who offend against society. Offenders sometimes make disclosures in therapy which indicate that they cannot be safely left at large in the community. Respondent's case is a good example. He was originally sentenced to probation, conditioned on his participation in a sex offender treatment program, for conduct which consisted of making sexually suggestive and threatening comments to young girls. *See State v. Fuller*, 880 P.2d 1340, 1341-42 (Mont. 1994). The offenses he disclosed in therapy were of an entirely different order of magnitude, involving actual non-consensual sexual intercourse with children. Pet. App. 4a. The sentencing court took note of the more serious nature of these offenses by

sentencing Respondent to a period of incarceration following his conviction for the more serious offenses. The Montana Supreme Court's decision essentially eliminates the ability of states to take this kind of action based on information provided by a sex offender during treatment.

II. The Montana Supreme Court's Decision Fails To Recognize And Give Effect To This Court's Decisions Holding That Sentencing Leniency May Be Exchanged For Relinquishment Of Rights Guaranteed By The Constitution.

Certainly, the State of Montana could not compel Respondent's agreement to make these disclosures had he been unwilling to do so. The Fifth Amendment guarantees that he could assert his right to remain silent and to refuse to make any statements to treatment providers regarding the offenses for which he had been sentenced and any other offenses he had committed. Just as certainly, however, the Constitution does not require Montana to afford Respondent leniency in sentencing if he is unwilling to satisfy the court's requirements that qualify him for lenient treatment. This is true even where, as here, the offender's willingness to provide certain information is a necessary condition of the offender's qualification for leniency. The laws of the amici states confer substantial discretion on sentencing judges in adopting conditions of probationary sentences. For example Kan. Stat. Ann. § 21-4610 (1995). It is widely recognized that probationers do not enjoy the full range of constitutional privileges, and that conditions of probation may authorize actions by law enforcement officials with respect to

probationers that would violate the constitutional rights of persons free from penal supervision.

For example, one of the most common probation conditions in the amici states is a requirement that probationers submit to warrantless search on reasonable grounds at the request of probation officers or law enforcement officials.[4] This Court has rejected arguments that such restrictions violate the Fourth Amendment. *Griffin*, 483 U.S. at 875 (probation supervision is a " 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.") Courts have even approved probation restrictions that burden First Amendment rights where justified by important penal objectives. *United States v. Turner*, 44 F.3d 900 (10th Cir.), *cert. denied*, 115 S. Ct. 2250 (1995).

Amici submit that the Court's decisions dealing with plea bargaining are also instructive here. Like a plea bargain, an imposition of probation involves the agreement, or at least the acquiescence, of the offender to the surrender of certain liberty interests in exchange for an expectation of leniency in sentencing. Negotiated pleas always involve some measure of relinquishment of the offender's Fifth Amendment right to remain silent, *Brady v. United States*, 397 U.S. 742, 748 (1970), but the Court has consistently rejected the claim that an offer of leniency in

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[4] A similar requirement exists in federal sentencing law. 18 U.S.C. § 3563(a)(4) requires drug offenders to submit to warrantless drug testing. Seizure of breath and bodily fluids for chemical analysis is a search for Fourth Amendment purposes. *Schmerber v. California*, 384 U.S. 757 (1966).

charging or sentencing to induce the plea, and the concomitant waiver of the defendant's silence, constituted unconstitutional coercion. *See, e.g., Corbitt v. New Jersey*, 439 U.S. 212 (1978) (upholding statutory scheme that provided mandatory penalty only after trial); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (imposition of additional charges after failure of plea bargain not unconstitutional).

Like the beneficiary of a plea bargain, Respondent received lenient treatment at sentencing through his acquiescence in certain conditions of probation. Without that acquiescence, it is not mere speculation to observe that a court might well have been unwilling to leave him at large in the community. One of the conditions in which he acquiesced was the obligation to disclose, as part of his sex offender therapy, his offending history as pertains to the sexual crimes with which he was charged. That obligation was not placed on him with the purpose of incriminating him further – its purpose was to ensure that he was willing to accept responsibility for his acts and that he was not "in denial", both conditions of eligibility for the sex offender treatment program. However, neither was he assured, either in fact or by a provision of state law, that he would not be prosecuted if he disclosed incriminating information.

Under these circumstances, the Montana Supreme Court erred in holding that Respondent's disclosures were anything other than voluntary, and specifically in holding that use of his statements made in the course of the treatment program was barred by the Fifth Amendment in the absence of a timely assertion of the privilege.

The Montana court's decision makes sex offender treatment as a condition of a probationary sentence a difficult proposition for a prosecutor or a sentencing court. Unless both are willing to immunize a defendant from prosecution based on disclosures made in treatment, probation conditioned on participation in the treatment will not be a viable sentencing alternative.[5]

III. The Court's Decisions Identifying The Few Situations In Which The Fifth Amendment Privilege Is Self-executing Do Not Support The Montana Court's Decision.

The text of the Fifth Amendment states that a person may not be compelled in a criminal case to be a witness against himself. In *Minnesota v. Murphy*, 465 U.S. 420 (1984), the Court summarized its case law on the question of whether the Fifth Amendment privilege may be claimed by a person who voluntarily testifies and does

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[5] The sentencing court's dilemma is compounded if the Montana Supreme Court's decision in *State v. Imlay*, 813 P.2d 979 (Mont. 1991), *cert. dismissed*, 113 S.Ct. 444 (1992) correctly states the law. In *Imlay*, the Montana court held that once an offender is admitted to treatment, a court may not revoke his probation if he asserts his Fifth Amendment privilege and refuses to comply with the treatment program's requirement that he accept responsibility for his crime and disclose his offending history. Thus, under *Imlay* and the case at bar, when an offender enters a treatment program as a condition of probation, the sentencing court cannot enforce through revocation of probation the requirement that the offender comply with the program. Moreover, the offender cannot be prosecuted for offenses he discloses if he does comply.

not timely invoke the privilege. The Court first recognized the general rule that "in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." 465 U.S. at 427, *quoting Garner v. United States*, 424 U.S. 648, 654 (1976). The Court then identified three categories of cases in which exceptions to the general rule have been recognized: (1) custodial interrogation requiring *Miranda* warnings; (2) cases in which the offender is threatened with punishment for his reliance on the privilege; and (3) cases in which a taxpayer refuses to file a gambling tax return.

The first and third of these exceptions are obviously inapplicable here. The exception for gambling tax cases has been narrowly construed, as *Murphy* clearly shows. 465 U.S. at 439-40. The Court in *Murphy* further explained that an interview with a probation officer was not an inherently coercive setting sufficiently similar to custodial interrogation to trigger Fifth Amendment protections similar to those required in *Miranda v. Arizona*, 384 U.S. 436 (1966). 465 U.S. at 429-33. Conversations between an offender and a treating professional in a sex offender treatment program are if anything even more attenuated from the concerns which surround custodial interrogation. In the treatment setting the offender will in every case have been afforded the opportunity to consult with counsel during sentencing regarding the need to make disclosures about his prior conduct during the treatment program. The treatment program's objective is to correct the offender's behavior, not to elicit further incriminating information from him. *Murphy*'s holding that *Miranda* is inapplicable to meetings with a probation officer should

also foreclose its application to sex offender treatment programs. *See Murphy*, 465 U.S. at 433.

The amici states further submit that this case does not present a "classic penalty situation" which would render the Fifth Amendment self-executing. *Murphy* suggests in *dicta* that revocation of probation could in some circumstances be a "penalty" which excuses the failure to assert the Fifth Amendment privilege. 465 U.S. at 435-40. However, the amici states respectfully submit that the discussion of the probation condition at issue in *Murphy* should not be applied to the special situation presented by Respondent's case – a sex offender whose liberty is conditioned on his participation in a program the successful completion of which is deemed by the sentencing court to be essential to the security of the community.

None of the cases in which this Court has held that the threat of a penalty rendered the Fifth Amendment self-executing involved sex offenders placed at liberty in the community on the condition that they make certain disclosures, some of which could clearly be incriminating in matters other than the one in which the probationary sentence was imposed. The cases cited in *Murphy* included several in which employment consequences were considered to be "penalties", such as *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (statute requiring removal from political office as penalty for assertion of Fifth Amendment privilege in grand jury proceedings), *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (statute disqualifying public contractor for assertion of Fifth Amendment privilege in grand jury proceedings), *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (city charter provision requiring discharge from

employment of persons asserting Fifth Amendment privilege), *Gardner v. Broderick*, 392 U.S. 273 (1968) (same), and *Garrity v. New Jersey*, 385 U.S. 493 (1967) (threatened discharge of police officers for refusal to respond to questions regarding official duties). In none of these cases could the person claiming the benefit of the privilege assert only a "conditional liberty" interest such as the one enjoyed by a probationary sex offender. *See Griffin*, 483 U.S. at 874, *quoting Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

The Court in *Murphy* also cited its prison discipline decision in *Baxter v. Palmigiano*, 425 U.S. 309 (1976), in which it had held that the Fifth Amendment was not offended by prison disciplinary rules allowing a decision-maker to draw adverse inferences from a prisoner's assertion of the right to remain silent. Amici submit that *Baxter* actually supports in some respects the position asserted by Montana in this case. The Court in *Baxter* recognized that in a formal criminal prosecution the drawing of adverse inferences from an assertion of the privilege would be forbidden. 425 U.S. at 317, *citing Griffin v. California*, 380 U.S. 609 (1965). The Court found, however, significant differences between assertion of the Fifth Amendment privilege in the context of a criminal prosecution and in a prison disciplinary proceeding. 425 U.S. at 317-18.[6]

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[6] Concededly, the Court in *Baxter* did indicate that inmates must be offered use immunity to prevent a State from using in a future criminal proceeding statements made by an inmate at a disciplinary hearing in which adverse inferences could be drawn from an assertion of the right to remain silent. 425 U.S. at 316. However, the Court cited only the employment cases in

Similarly, amici submit that significant differences exist between the assertion of a Fifth Amendment privilege by an employee or officer who has been convicted of no crime and whose liberty interests are unconditioned and the assertion of that right by a probationary offender who has reaped the benefits of a probationary release conditioned on his willingness to comply with the conditions of a treatment program. In the latter case, the offender is only being required to do that which he agreed to do as a condition of his being granted a less onerous criminal sentence by a sentencing court. This is an entirely different kind of "compulsion" from that which was applied in the employment cases, because it is compulsion to which the offender voluntarily agreed to submit in exchange for a tangible benefit at sentencing.

Just as the Constitution does not prevent a State from requiring an offender to waive certain constitutional protections as part of a plea bargain, amici submit it does not prevent a State from requiring an offender to disclose information to therapy providers that the providers have determined they need to effectuate the therapy. If the offender chooses to accept the benefits of such a probationary program, he ought to be required to comply with its obligations as well. When he does so, his compliance cannot fairly be said to have been "compelled" for purposes of Fifth Amendment analysis. The Court should grant review of the Montana Supreme Court's contrary

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support of that proposition. Amici submit that a different rule should apply in the limited context of statements made in sex offender treatment programs in which an offender agrees to enroll as a condition of probation.

decision in this case to clarify the import in this context of *Murphy* and the cases cited therein.

CONCLUSION

The amici states respectfully urge the Court to grant Montana's petition for certiorari in this case. The case presents an important issue of constitutional law under the Fifth Amendment which has not been, but should be, decided by this Court.

Respectfully submitted,

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